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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1464

JAMES G. WATT, Secretary of the Interior, *et al.*,

Petitioners,

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ATLANTIC RICHFIELD COMPANY, *et al.* AS *AMICI CURIAE*

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Atlantic Richfield Company and the eight other companies, who appeared below as amici curiae[1] and who are vitally interested in the expeditious development of the oil and gas resources on the Outer Continental Shelf (OCS), file this brief with the consent of the petitioners and respondents.

SUMMARY OF ARGUMENT

On April 6, 1981, this Court granted the Federal defendants' petition for a writ of certiorari on two issues: (1) whether the Outer Continental Shelf Lands Act, as amended (OCSLA), 43 U.S.C. § 1337, in authorizing specific bidding systems for the

[1] Chevron U.S.A. Inc., Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Tenneco Oil Company, Texaco Inc., and Union Oil Company.

sale of OCS oil and gas leases, requires the Secretary of Energy to promulgate regulations for all of those systems and the Secretary of the Interior to utilize them; and (2) whether the respondents in this case have standing to sue.

We are confident that the Federal petitioners' brief will provide the Court with an interpretation of the OCSLA bearing on the issue of the use of alternative bidding systems for OCS lease sales and will contain an analysis of the law of standing. Amici will not repeat these arguments here. Rather, this brief will review: (1) the primary congressional purpose in the 1978 Amendments to expedite exploration and development of OCS energy resources; and (2) the concommitant congressional intent to reduce litigation which might delay the OCS oil and gas program.

We stress these aspects of the statute because scrutiny of the D.C. Circuit's decision leads to the conclusion that its liberalization of the law of standing to permit increased litigation against the OCS program and its nullification of the Secretary's discretion with respect to the actual use of particular bidding methods threatens delay of the OCS program in a fashion contrary to the national interest, as expressed by Congress in the 1978 Amendments to the OCSLA.

This threat is made clear by the lower court's open-ended invitation to respondents and others dissatisfied with the pace of implementing the alternative bidding procedures authorized by the 1978 Amendments to pursue litigation to block future OCS sales:

> "Most important, by mid-1981 failure to issue regulations on variable net profit share bidding and work commitment bidding creates a clear violation of the statutory mandate to experiment with alternatives to front end cash bonus systems and accordingly a clear case of irreparable harm to appellants, and the public and private interests they represent. Thus, the public harm in losing any realistic opportunity to test all the

> OCSLA leasing methods will outweigh any incidental delay to the transaction of additional lease sales."

Energy Action Educational Foundation v. *Andrus*, slip op. No. 80-2127, at 44 (D.C. Cir. Oct. 30, 1980) (Pet. App. 49a).

Had the D.C. Circuit paid proper regard to Congress' intention to expedite OCS development and to lessen the prospect of litigation aimed at stalling OCS development, such as the present case, it would have had an appropriate appreciation of the need to respect the Secretary of the Interior's discretion in deciding which bidding systems should be used in lease sales. It also would have been far less generous in declaring that all consumers, as well as others, have standing to challenge the leasing arrangements used by the United States in disposing of Federal lands.

ARGUMENT

I. CONGRESSIONAL RECOGNITION OF THE IMPORTANCE OF EXPEDITED DEVELOPMENT OF THE OCS

A. The Primary Purpose of the OCSLA Is To Expedite the Development of OCS Resources

In 1953, the OCS Lands Act, 43 U.S.C. §1331, confirmed the Federal government's jurisdiction over all but the near-shore lands granted to States by the Submerged Lands Act, 43 U.S.C. §1301. Federal leasing on the OCS proceeded solely in the Gulf of Mexico and off California for the next two decades. However, in 1973 the Arab oil embargo made the United States acutely aware of its dependence on foreign oil imports and jolted the country into the realization that its domestic oil program must be strengthened by expanding OCS production. In 1974, Senator Henry Jackson, Senate sponsor of what were to become the 1978 Amendments to the OCSLA (S. 3221), made clear the sense of urgency felt by Congress as to the need for expedited OCS development:

> "[This] legislation . . . is of extreme importance in light of the potential catastrophic situation facing the Western World.
>
> "We are in a situation where the OPEC oil cartel is now in the process of charging prices that will transfer the wealth and resources of the Western industrialized nations almost in toto over the next many years."

120 Cong. Rec. 30981-82 (1974).

Recognizing that United States dependence on foreign oil presented perils to national security, both military and economic, and that domestic resources must be developed, Congress turned to the OCS as the single largest potential source of additional domestic energy.[2] Senator Jackson summarized Congress' aspirations for the OCS program:

> "[T]he Outer Continental Shelf is America's best hope for finding additional oil and gas resources and reducing our dependence on foreign oil."

124 Cong. Rec. S13994 (daily ed. August 22, 1978) (remarks of Sen. Jackson).

In light of the recognition of the importance of OCS development, the congressional committees approved the 1978 Amendments to the OCSLA with:

> "The basic purpose . . . to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."

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[2] 123 Cong. Rec. 23015 (July 14, 1977) (remarks of Sen. Jackson). For example, Representative Hyde reported that in 1976 only 14 percent of U.S. domestic oil production and 22 percent of U.S. natural gas production came from the OCS, whereas offshore potential reserves were estimated to be more than 80 percent of proven U.S. oil reserves and 47 percent of proven U.S. natural gas reserves. 124 Cong. Rec. 821 (1978) (remarks of Rep. Hyde). *See* S. Rep. No. 284, 95th Cong., 1st Sess. 42 (1977); H.R. Rep. No. 590, 95th Cong., 1st Sess. 53 (1977); 124 Cong. Rec. H8875 (daily ed. August 17, 1978) (remarks of Rep. Murphy). *See also* Library of Congress Congressional Research Service, Study on Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, at 2, 8 (Comm. Print March 1976).

H.R. Rep. No. 590, 95th Cong., 1st Sess. 53 (1977). Although essentially ignored by the panel of the D.C. Circuit which rendered the decision now under review, this "basic purpose" was respected in two earlier opinions of other panels of the Court,[3] as well as those of other circuits.[4]

Finally, to underscore the preeminence of the goal of expedited OCS operations, Congress articulated as the first of the specific legislative purposes underlying the 1978 Amendments its desire to:

> "establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade . . . . "

43 U.S.C. §1802(1). Thus, from the remarks of the sponsors of the Amendments when first proposed until their adoption four years later, the need to expedite OCS development consistently remained Congress' principal purpose.

B. Section 8 of the OCSLA Reflects the Primary Congressional Purpose of Expediting the OCS Program

Congress sought to implement its primary purpose of expediting OCS development throughout the Amendments, including Section 205 which amended Section 8 of the OCSLA, 43 U.S.C. §1337, by providing for alternative bidding systems. As described by Representative Murphy, sponsor of the House bill,

> "the bill will expedite OCS development by: Eliminating bureaucratic conflicts; reducing the possibility of frivolous lawsuits; minimizing present opposition to

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[3] *See* North Slope Borough v. Andrus, 642 F.2d 589, 595 n.17 (D.C. Cir. 1980); Energy Action Educational Foundation v. Andrus, 631 F.2d 751, 761 n.58 (D.C. Cir. 1979).

[4] *See* Conservation Law Foundation v. Andrus, 617 F.2d 296, 298 (1st Cir. 1979); New York v. Kleppe, 9 E.R.C. 1793 (2d Cir. 1976).

> offshore development on the part of States and other interests; and insuring proper financial relief to coastal States, fishermen, and those affected by oilspills."

124 Cong. Rec. 814-15 (1978) (remarks of Rep. Murphy). *See also* 124 Cong. Rec. H8873 (daily ed. August 17, 1978) (remarks of Rep. Murphy).

Thus, in drafting and adopting the Amendments authorizing alternative bidding methods, Congress maintained its focus on expediting the OCS program by carefully preserving the Secretary's discretion as to whether, when, and to what extent such methods should be used. In so doing, Congress sought to ensure that disputes as to the pace of implementing Section 8 would not delay the OCS program.

In this regard, the manner in which Congress preserved the Secretary's discretion through a special provision of the OCSLA (43 U.S.C. § 1337(a)(5)(B)) giving him flexibility not to be bound by the parameters on the use of alternative bidding systems is highly significant.[5] The earliest version of this discretionary provision allowed the Secretary to deviate from the percentage requirement for untried bidding systems only through affirmative action by both Houses of Congress within thirty days. 122 Cong. Rec. 17757 (1976). However, as the minority pointed out and as was ultimately recognized, such a requirement is "a logical and practical impossibility where an actual national emergency is not involved." H.R. Rep. No. 1084, 94th Cong., 2d Sess. 262 (1976) (minority view). Thus, the House subsequently adopted an amendment requiring only prior "single House approval with detailed swift procedures for congressional consideration and action." 122 Cong. Rec. 23144 (1976).

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[5] This discretionary provision allows the Secretary to deviate from the percentage requirements otherwise governing use of cash bonus-fixed royalty bidding should he

> "determine[ ] that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this Act."

43 U.S.C. §1337(a)(5)(B).

Nevertheless, certain House members were still dissatisfied with the way in which the bidding system issue could impede OCS development. Thus, a later version of the House bill provided that the Secretary could deviate from the percentage limitations unless he was barred by a resolution of disapproval from either House of Congress within thirty days following the Secretary's notice to the Congress that he intended to depart from the parameters prescribed in the OCSLA for the use of new bidding systems. H.R. Rep. No. 590, *supra*, at 47.[6]

Even then, Congress was not satisfied, for it took one final step further and adopted the discretionary provision as it now exists—the Secretary in his discretion may deviate from percentage requirements governing use of certain bidding methods if he determines, without any congressional approval or disapproval, that such requirements are inconsistent with the purposes and policies of the 1978 Amendments. *See* 43 U.S.C. § 1337(a)(5)(B).

An early version of that provision was introduced in an amendment by Representative Brown and was then slightly altered with respect to the specific percentage requirements by Representative Emery. 124 Cong. Rec. 1639 (1978). During the floor debate on Representative Emery's amendment, it was recognized that, without the amendment, the prior Committee bill permitting only single-House disapproval of deviation from the percentage requirements could force the Secretary to use bidding systems for a certain percentage of tracts "whether or not the Secretary of the Interior in his judgment thinks that they are effective or even detrimental. His hands are tied if he so thinks." 124 Cong. Rec. 1639 (1978) (remarks of Rep. Fish).

By contrast, it was pointed out that Representative Emery's amendment, like Representative Brown's, removed that impediment and allowed the Secretary "to make that judgment himself" without going back to Congress. *Id.* Despite the

[6] At least one respondent here unsuccessfully voiced its opposition to the "Secretary's authority to waive the bidding restrictions." *See* H.R. Rep. No. 590, *supra*, at 117 (citing the testimony of James F. Flug of Energy Action).

Committee's and Representative Murphy's opposition, the Emery amendment passed. By preserving the Secretary's discretion through the special provision in Section 8, Congress unmistakably emphasized its intent not to allow disputes over the choice of bidding systems to impede the orderly progress of the OCS program.[7]

So it was that Congress changed its role as to the Secretary's use of alternative bidding systems from one of prior restraint, which could impede OCS leasing, into post-hoc oversight to provide guidance to the Secretary for future decisions.[8] *A fortiori,* courts should not invite delay in the OCS program by converting the Secretary's discretionary tasks in connection with the choice of alternative bidding systems into legally-mandated duties enforced by private plaintiffs armed with motions for injunctive relief in the manner contemplated by the D.C. Circuit. *See* pp. 2-3, *supra.*

II. CONGRESSIONAL INTENT TO REDUCE LITIGATION

The legislative history of the OCSLA demonstrates that Congress sought in the 1978 Amendments to expedite OCS oil and gas development by discouraging lawsuits of the kind brought by respondents in this case. Congress repeatedly recognized the potential for delay of OCS development posed by litigation and sought to guard against it.[9] The supporters of

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[7] *See, e.g.,* 124 Cong. Rec. 1835 (1978) (remarks of Rep. Dodd) ("The Secretary of the Interior does have the *discretionary* authority to waive certain requirements if it is determined that compliance would *unduly delay* OCS development") (emphasis added).

[8] *See, e.g.,* 43 U.S.C. §§1337(a)(8)(B), 1337(a)(9)(D), 1343(a)(2)(A). *See also* 124 Cong. Rec. 1634 (1978) (remarks of Rep. Brown) ("[T]he Congress could come in and say, 'Mr. Secretary, we are concerned about your using this system,' or in the alternative, *not* using this system") (emphasis added); H.R. Rep. No. 1214, 96th Cong., 2d Sess. 15 (1980) ("Congress decided not to accept language providing a single one-House veto on waiver of the minimum or maximum and instead intended to monitor this provision by oversight").

[9] *See, e.g.,* 124 Cong. Rec. 815 (1978) (remarks of Rep. Murphy); 124 Cong. Rec. 819 (1978) (remarks of Rep. Hughes); 124 Cong. Rec. 822 (1978) (remarks of Rep. Forsythe). *See also* 124 Cong. Rec. H8873 (daily ed. August 17, 1978) (remarks of Rep. Murphy).

the legislation continually emphasized their intention to avoid delay resulting from the kind of litigation typified by this case:

> "By opening up the OCS decision-making process in a consensus-building fashion, the bill will provide for more stable and efficient development, which will be less subject to delaying court actions. We must allow swift action on this bill to provide badly needed modernization of the outmoded 1953 act."

124 Cong. Rec. 198 (1978) (remarks of Rep. Zefferetti).[10]

Congress inserted special provisions into the OCSLA to remove litigation-induced delays to the OCS program. For example, while providing special direct review of the leasing program setting forth a five-year schedule of OCS sales, Congress created in Section 18(d)(3), 43 U.S.C. § 1344(d)(3), an exception to the usual rule permitting interim relief pending such review:

> "[L]easing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter."[11]

Similarly, in providing for citizens' suits under Section 23, 43 U.S.C. § 1349, Congress kept in mind the need to streamline

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[10] The Ad Hoc Select Committee on the OCS emphasized the continuing need to eliminate delaying court actions:

> "Most agree that the main reason for delays in OCS development have been the lawsuits which even when successful [for the Federal government] have lead to extensive stays of activities."

H.R. Rep. No. 1835, 95th Cong., 2d. Sess. 20 (1979). *See also* S. Rep. No. 284, 95th Cong., 1st Sess. 123 (1977) (reprinting Letter to Senator Jackson from Secretary Andrus (May 13, 1977)).

[11] *See* H.R. Rep. No. 590, *supra*, at 151, explaining Congress' purpose to allow leasing to proceed during the pendency of judicial review of the leasing program.

and consolidate judicial review and curtail delaying lawsuits.[12] It specifically focused on the law of standing, and made clear its desire that standing *not* be expanded to permit increased litigation aimed at delaying OCS sales. For example, Representative Wiggins initially opposed the citizens' suit provision due to his concern that it would lead to a floodgate of law suits by parties otherwise lacking standing. Representative Eckhardt addressed this concern by delineating the restrictive nature of standing under Section 23:

> "The language here is more restrictive than the language in the Clean Air Act. Indeed, the language here essentially writes into this bill the rule of law which exists as a general proposition expressed in Kentucky Utilities[,] Flast, Data Processing, Barlow and Sierra Club versus Norton [Morton *sic*].
>
> "It was said in the Sierra Club case that where a party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged such a 'personal stake in the outcome of the controversy as to insure that the dispute sought to be adjudicated will be presented in an adversary context and in the form historically viewed as capable of judicial resolution.' "

122 Cong. Rec. 23162 (1976) (remarks of Rep. Eckhardt).

Rep. Wiggins added in response

> "that the interest of the plaintiff alleged to have been violated by the defendant must be substantial, it must be immediate, it must be real and not so peripheral as to indicate an indirect interest in the lawsuit."

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[12] Section 23 of the OCSLA provides in part that

> "any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf. . . . "

43 U.S.C. §1349(a)(1).

122 Cong. Rec. 23162 (1976) (remarks of Rep. Wiggins). Affirming Representative Wiggins' understanding that Congress did not void "the general rules of substantiality as to that interest," *id.*, Representative Eckhardt further stated:

> "[I]t would be exactly the same standard, the same type of interest, that existed in Hardin against Kentucky Utilities Co., Flast against Cohen, Data Processing Service Organizations against Camp, Barlow against Collins, and Sierra Club against Morton."

122 Cong. Rec. 23162 (1976) (remarks of Rep. Eckhardt).

Later, Congress again enunciated its intent to limit delaying lawsuits through Section 23, as evidenced in the House action taken with regard to Section 23(a) of an early Senate bill, S. 521. In response to then-Secretary Kleppe's concern that standing under Section 23(a) might be read too broadly, the Committee and the House effected

> "a *limit on such suits* by providing that only those showing a *'probability'* rather than a *'possibility'* of having an interest adversely affected can sue."

122 Cong. Rec. 30270 (1976) (reprinting Letter from Representative Murphy to Secretary Kleppe (September 2, 1976) (emphasis added)).

Finally, on the eve of House passage of the 1978 OCSLA Amendments, Representative Wiggins again noted his concern that Section 23 not be construed to broaden standing, and requested that Representative Murphy

> "affirm, if he is able to do, that it is not the intent of the Committee in recommending citizens' suits to alter the law of standing, and that we merely are adopting the law in the Alyeska case [421 U.S. 240 (1975)]."

124 Cong. Rec. 1825 (1978) (remarks of Rep. Wiggins). Representative Murphy agreed, stating "that we are not changing the standing." 124 Cong. Rec. 1825 (1978) (remarks of Rep. Murphy). Accordingly, Representative Wiggins endorsed

Section 23(a). 124 Cong. Rec. 1826 (1978) (remarks of Rep. Wiggins).

The final reports of both Houses specifically state the congressional intent that Section 23 provide standing only to "persons who meet the requirements for standing to sue set out by the Supreme Court in *Sierra Club* v. *Morton* [405 U.S. 727 (1972)]." S. Rep. No. 284, *supra*, at 81; H.R. Rep. No. 590, *supra*, at 161. The House Report further clarifies the meaning of Section 23(a):

> "Thus, the scope of persons who can sue are those who can show an *actual* interest that *is* being negatively affected, or *will probably be* negatively affected at a reasonable time in the future. The interest must be *discernible* and *ascertainable*. Standing to sue includes not only those who have an economic interest, or who have suffered or will probably suffer a tortuous injury, but also those who may have a definable aesthetic or environmental interest."[13]

H.R. Rep. No. 590, *supra*, at 161 (emphasis added).

CONCLUSION

The foregoing review of the legislative history underlying the 1978 Amendments demonstrates that Congress recognized the importance of the OCS as the single largest potential source of new domestic energy and sought to expedite its development. To do so, Congress provided the Secretary with the discretion to utilize the various bidding systems authorized by the OCSLA. In further efforts to allow for expedited OCS operations, Congress made clear its intention that litigation should be reduced, not expanded. In frustration of these congressional purposes, the D.C. Circuit's decision broadly construes standing under the 1978 Amendments and shackles the Secretary with

[13] Plaintiffs here have no aesthetic or environmental interest in the matters which they seek to litigate.

judicially-mandated and litigation-spawning requirements as to the use of bidding systems. That decision should, therefore, be reversed.

Respectfully submitted,

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